LIBRARY
SUPREME COURT, U. S.

FILED
JAN 11 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~810~~ 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
60 Wall Street,
New York 5, New York.
212 HAnover 2-1023

TABLE OF CONTENTS

	PAGE
Statement	1
Conclusion	5

TABLE OF CASES

Evers v. Dwyer, 358 U. S. 202	3
Fenster v. Leary, No. 905, October Term 1960; docketed on December 27, 1966	2
Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York, Southern District of New York, Docket No. 66, Civ. 4307, decided October 27, 1966	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 810

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION

Appellant submits the following observations and contentions in opposition to appellee's motion to dismiss or affirm.

Statement

Although this action was brought for the purpose of avoiding martyrdom to Zwickler who is attempting to exercise First Amendment rights, he was met with a dismissal of his complaint by the District Court, Rosling, J., dissenting, on the ground that the federal court should abstain from deciding the case, irrespective of its merits. This case with its three separate opinions has already become a conspicuous case in the Second Circuit, and unless reviewed or commented upon by this court, will facilitate the brooming out from the District Courts lying within the

State of New York of all actions seeking a declaration of the invalidity of state statutes on the ground that they are repugnant to the Constitution of the United States. Since the rationale of the District Court is that the existence of the remedy for a declaratory judgment in New York courts is sufficient good reason for abstention, it is not improbable that the decision in this case will become the basis for future similar decisions. Although the opinion of the court in this case is only a few months old, and not even reported, it has already been cited for the decision in *Fenster* v. *Leary,* No. 905, October Term 1960; docketed on December 27, 1966, and which in turn was used in *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of the City of New York,* Southern District of New York, Docket No. 66, Civ. 4307, decided December 27, 1966. Thus, at least 5 federal judges sitting in the City of New York have already found favor with the principle adopted. For this reason alone, the order should be reviewed.

In support of his motion, the appellee relies on the opinion of the District Court. The response to that argument was anticipated in the Statement as to Jurisdiction and need not be repeated here. The response is also found in the dissenting opinion. What the appellee in effect argues is that the court below was correct. Zwickler addresses himself to the question before the court: Is there substantiality to his appeal? There is substantiality. This is manifest not only by the division in the District Court, but also in novelty and importance of the substantive and procedural questions presented. On the substantive side, this Court has never passed upon the validity of a statute which punishes the dissemination of anonymous political literature. On the procedural side, this case is becoming a precedent in the Second Circuit for ridding the federal district courts, sitting in New York, of similar cases, as disclosed under "Statement", above. Correction, or at

least suggestion by this court is thus needed. On both points, therefore, it is necessary that this case be reviewed.

Lest it should escape attention, a fact should be added in reply to appellee's suggestion (*Motion,* p. 6) that Zwickler in order to learn his constitutional rights, should again violate the law. The trial court on his first prosecution, held in an unreported opinion that the statute is constitutional (Statement as to Jurisdiction, p. 15).

As to appellee's contention (*Motion,* p. 8) that Zwickler's position is hypothetical,—nothing could be further from reality. Even the District Court explicitly said it had jurisdiction because an actual case and controversy is presented (Statement as to Jurisdiction, p. 17, last line, "It alleges a case or controversy which is within the adjudicatory power of this court").

Indeed, Zwickler's plight is no different in kind or degree from that of Evers in *Evers* v. *Dwyer,* 358 U. S. 202, where this court on squarely similar facts held that there was a case and controversy. Evers, it will be recalled, attempted to sit in any seat in a segregated bus. Upon his refusal to sit in a seat designated for black persons, he was told to comply with the municipal ordinance or meet the penalties of non-compliance. Rather than comply, he left the bus and instituted an action to declare the ordinance invalid. This court expressly held that a controversy existed. Zwickler is in every respect in a similar controversy. Zwickler was prosecuted under the statute; the statute was held constitutional; and he was convicted. He seeks to distribute the anonymous pamphlet not only during the elections of 1966, but at subsequent events. He is afraid to do so, because of what had happened to him. In his case, he is not merely chilled in the exercise of his rights. He is frozen. He cannot function because of his anxieties. He did not make distribution immediately prior

to the 1966 election because of fear of the existing statute. He also fears to make distribution in the future. Unless he gets protection by this litigation, he will *not* exercise his First Amendment rights. The statute thus inhibits presently and immediately with the exercise of those rights.

Moreover, it should be noted, Zwickler has greater reason to be apprehensive than Evers. Zwickler, as distinct from Evers, was actually prosecuted and had an opinion from the trial court that the law is constitutional. Zwickler, as distinct from Evers, had the district attorney pursue him by the People's appeal to the New York Court of Appeals.

As to the intimation lurking in a footnote that this case is now moot because the 1966 election passed during this litigation (a confirmation of the observations on the delays in exercising First Amendment rights under "Conclusion" in the Statement as to Jurisdiction, p. 10), the complaint as well as the District Court show that Zwickler is not seeking to enforce his First Amendment rights only with respect to the election of 1966, but "subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign. Such distribution is intended to be made in quantities of more than a thousand copies of such anonymous leaflet" (Complaint, par. "Fourteenth" and Statement as to Jurisdiction, p. 14). It could not be seriously contended that Zwickler should be required to institute an action before each intended distribution. All of which emphasizes that it is necessary that relief be afforded in this case, because the attrition of litigation presupposes the passage of time.

CONCLUSION

For the foregoing reasons the motion should be denied and the court, instead, should note probable jurisdiction.

Dated, January 1, 1966.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
60 Wall Street,
New York 5, New York.
212 HAnover 2-1023